No. 76-987

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROSS BAKER, d/b/a
ROSS-BAKER TOWING, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ALFRED G. ALBERT,
Acting Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JAMES B. LEONARD,
Attorney,
Department of Labor,
Washington, D.C. 20210.

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This is a suit for enforcement of the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.* Petitioner, who operates a towing service in the Los Angeles area, seeks review of the decision of the court of appeals: (1) that petitioner's employees are within the Act's coverage because they are engaged in "commerce," as that term is defined in Section 3(b) of the Act, 29 U.S.C. 203(b); and (2) that petitioner's compensation plan violates the overtime provisions of Section 7(a) of the Act, 29 U.S.C. 207(a). The court of appeals is correct in both respects, however; there is no conflict among the circuits on these questions and no reason for review by this Court.

1. The district court and the court of appeals correctly held that petitioner's employees are engaged in commerce

within the coverage of the Act. The parties stipulated that petitioner's tow truck drivers serve "State Highways and Interstate Freeways in the San Fernando Valley, including a two and one-half to three mile section of the San Diego Freeway from the interchange of the Golden State Freeway to the Nordoff Exit" (R. 162).[1] Petitioner's drivers fix flat tires, start stalled vehicles, charge batteries, provide gasoline, and tow damaged, disabled and abandoned vehicles (R. 161-162).

The activities of petitioner's employees in keeping the channels of interstate commerce clear of disabled or wrecked vehicles are "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' " *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 130. Following *Overstreet*, which held that the Act applies to employees of a company engaged in maintaining a drawbridge that, unless properly serviced, would obstruct interstate transportation, numerous lower courts have applied the Act to employees of towing and wrecker services, such as petitioner's, that help "maintain the road free from obstruction." *Crook* v. *Bryant*, 265 F. 2d 541, 543 (C.A. 4); *Gray* v. *Swanney-McDonald, Inc.*, 436 F. 2d 652 (C.A. 9), certiorari denied, 402 U.S. 995; *Brennan* v. *Keyser*, 507 F. 2d 472 (C.A. 9), certiorari denied, 420 U.S. 1004. Petitioner, too, was engaged in commerce.[2]

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[1]"R." designates the record on appeal.

[2]Petitioner relies (Pet. 15-16) on *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, and *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, for the proposition that "commerce" requirements in statutes should be construed to avoid applying the statutes to local enterprises. But *Gulf* and *American Building* involved the Robinson-Patman Act and the Clayton Act, statutes with meanings and histories quite distinct from that of the Fair Labor Standards Act. The Court distinguished the Fair Labor Standards Act in both cases (*Gulf*, *supra*, 419 U.S. at 196; *American Building*, *supra*, 422 U.S. at 277).

2. The court of appeals correctly held, relying on *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, that petitioner violated the overtime requirements of the Act.

Section 7(a)(1) of the Act, 29 U.S.C. 207(a)(1), provides that an employee must receive compensation for hours worked in excess of 40 each week "at a rate not less than one and one-half times the regular rate at which he is employed." *Youngerman-Reynolds* held that the "regular rate," for purposes of this provision, includes piecework or commission payments as well as standard hourly rates. Thus, in the present case, in which petitioner pays a fixed commission of $5.00 for answering a police call (Pet. 7), petitioner violates the Act by not increasing the commission for calls answered after 40 hours have been worked. Here, as in *Youngerman-Reynolds*, "where an incentive plan replaces [or supplements] an hourly rate, the commissions become, in fact, the regular rate" and must be increased during overtime hours (Pet. App. 5). See also *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, which reaches a similar

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pointing out that "we are concerned in this case with significantly different statutes." Neither case supports the view that commerce requirements usually should be construed to exclude businesses like petitioner's. See *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773. The Fair Labor Standards Act has been construed by this Court "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; *Overstreet* v. *North Shore Corp.*, *supra*, 318 U.S. at 128. The acts of a tower and wrecker such as petitioner have effects on interstate commerce, and the Fair Labor Standards Act therefore applies. Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (local restauranteur serving travelers has an effect on interstate commerce).

conclusion with respect to employees paid an incentive bonus.[3]

The premium overtime rate puts financial pressure on "the employer to reduce the hours of work and to employ more men," and it "compensat[es] the employees for the burden of a long workweek." *Youngerman-Reynolds, supra*, 325 U.S. at 423-424. See also *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 577-578. Achievement of those goals depends upon treating incentive and piecework payments as a "regular rate," subject to increase after 40 hours have been worked. Petitioner's argument that treating incentive payments as a rate subject to increase would discourage the use of incentive plans amounts to no more than disagreement with the statute. It is, in any event, groundless. Commission and incentive payment plans are neither favored nor disfavored by the Act, which provides only that compensation (calculated by whatever means) must be increased during overtime hours.

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[3]Petitioner argues that the court of appeals misunderstood the payment plan. Although the court of appeals treated the case as if the employees receive an hourly rate or a commission, whichever is greater, petitioner argues that in fact its employees receive both an hourly rate and a commission (Pet. 7, 20-22). Even if petitioner were correct, this would not undermine the court of appeals' holding; petitioner concedes that it does not increase the commission or incentive payments during overtime hours. Petitioner's position, moreover, contradicts its stipulation in the district court. The stipulation provides (R. 163-164; emphasis added) that petitioner "guaranteed each of his tow truck drivers $1.65 an hour for the first forty hours and $2.48 an hour for the hours over forty per workweek *or* a commission on the total business that each driver brought in during the week, *whichever was greater*."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

ALFRED G. ALBERT,
Acting Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JAMES B. LEONARD,
Attorney,
Department of Labor.

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